(12)

No. 91-522

FILED
OCT 8 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SAUDI ARABIA, KING FAISAL SPECIALIST HOSPITAL, ROYSPEC,

Petitioners,

v.

SCOTT NELSON AND VIVIAN NELSON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

REPLY BRIEF FOR PETITIONERS

EVERETT C. JOHNSON, JR.
(Counsel of Record)
MARK E. NEWELL
PHILIP L. GORDON
CURTIS P. LU
LATHAM & WATKINS
1001 Pennsylvania Avenue, N.W.
Suite 1300
Washington, D.C. 20004
(202) 637-2200

MARC COOPER
COOPER & WOLFE, P.A.
Suite 700 Courthouse Tower
44 West Flagler Street
Miami, FL 33130
(305) 371-1597

Counsel for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. THE COMPLAINT IS NOT "BASED UPON COMMERCIAL ACTIVITY" WITHIN THE MEANING OF CLAUSE ONE OF SECTION 1605(A)(2)	3
A. Respondents' Interpretation Contravenes The Language, History And Purpose Of The FSIA	3
B. Respondents' Intentional Tort Claims Are Based Upon Governmental Rather Than Commercial Conduct, And Therefore Cannot Be Adjudicated Under The "Commercial Activity" Exception	8
C. Respondents' Negligence Claims Are Not "Based Upon Commercial Activity"	14
D. Respondents' "Public Policy" Arguments Are Properly Addressed To Congress, Not To This Court	16
II. RESPONDENTS' CLAIMS HAVE INSUFFICIENT CONTACT WITH THE UNITED STATES TO SUPPORT JURISDICTION UNDER SECTION 1605(A)(2)	17
CONCLUSION	20

TABLE OF AUTHORITIES

CASES Page

Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371 (5th Cir. 1980) 7, 13
Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989) 17
Callejo v. Bancomer, S.A., 764 F.2d 1101 (5th Cir. 1985) 13
Doe v. United States, 838 F.2d 220 (7th Cir. 1988) 15
Feres v. United States, 340 U.S. 135 (1950) 16
Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438 (D.C. Cir. 1990) 12, 14
Gemini Shipping, Inc. v. Foreign Trade Org. for Chemicals & Foodstuffs, 647 F.2d 317 (2d Cir. 1981) 5
Gould, Inc. v. Mitsui Mining & Smelting Co., 947 F.2d 218 (6th Cir. 1991), *cert. dismissed*, 112 S. Ct. 1657 (1992) 5
Kearney v. United States, 815 F.2d 535 (9th Cir. 1987) 15
Letelier v. Republic of Chile, 748 F.2d 790 (2d Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985) 7
Millen Indus., Inc. v. Coordination Council for N. Am. Affairs, 855 F.2d 879 (D.C. Cir. 1988) 7, 14
Mitchell v. Forsyth, 472 U.S. 511 (1985) 11
Ohntrup v. Firearms Ctr., Inc., 516 F. Supp. 1281 (E.D. Pa. 1981), *aff'd mem.*, 760 F.2d 259 & 263 (3d Cir. 1985) 8
Republic of Argentina v. Weltover, Inc., 112 S. Ct. 2160 (1992) ..... *passim*
Stena Rederi AB v. Comision de Contratos, 923 F.2d 380 (5th Cir. 1991) 17
United States v. Shearer, 473 U.S. 52 (1985) 15, 16
Walter Fuller Aircraft Sales, Inc. v. Republic of the Philippines, 965 F.2d 1375 (5th Cir. 1992) 14

STATUTES

28 U.S.C. § 1603(a) (1988) 6
28 U.S.C. § 1603(d) (1988) 4, 5, 6
28 U.S.C. § 1603(e) (1988) 3, 17

TABLE OF AUTHORITIES—Continued

Page

28 U.S.C. § 1604 (1988) 6
28 U.S.C. § 1605(a)(2) (1988) ..... *passim*
28 U.S.C. § 2680(h) (1988) 15

OTHER AUTHORITIES

H.R. Rep. No. 1487, 94th Cong., 2d Sess. (1976) 6

REPLY BRIEF FOR PETITIONERS

Petitioners Saudi Arabia, King Faisal Specialist Hospital (KFSH or the Hospital), and Royspec respectfully submit this reply brief in response to the brief of Respondents Scott Nelson and Vivian Nelson.[1]

SUMMARY OF ARGUMENT

Petitioners have demonstrated that Respondents' claims are not "based upon a commercial activity carried on in the United States" within the meaning of the "commercial activity" exception of the Foreign Sovereign Immunities Act (FSIA or the Act). Under the plain meaning of Section 1605(a)(2), a suit is "based upon" commercial activity only if the foreign state conduct that allegedly injured the plaintiff is commercial in nature. Brief for Petitioners (Pet. Br.) 18-25. This case alleges injuries occurring entirely in Saudi Arabia as a result of the arrest and imprisonment of Respondent by Saudi government officials. Because such acts cannot possibly be characterized as having a *commercial nature*, the "commercial activity" exception does not create jurisdiction over Petitioners.

In the face of this showing, Respondents have radically altered their theory of the statute and of the case. Having argued in both the district court and the court of appeals that "based upon" means "having a nexus with," Respondents now jettison this "jurisdictional nexus" test (the express basis of the Eleventh Circuit's decision) and proffer instead a new and equally erroneous construction of the "commercial activity" exception. Brief for Respondents (Resp. Br.) 23-25. Respondents finally acknowledge "that police activities are sovereign in nature," *id.* 33 n.27, but now claim that their case has nothing to do with Saudi law enforcement actions notwithstanding that the complaint, Respondent's sworn affidavit, his congressional

[1] When used in the singular herein, "Respondent" shall refer to Scott Nelson only.

testimony, and all his prior briefs complained of wrongful arrest and imprisonment, torture, and similar misconduct by Saudi police, prison officials, and other government agents and employees acting in their official capacity and under color of law. Instead, Respondents now depict the case as merely involving the "employment practices" and "employee 'disciplinary procedures' " of the Hospital acting in a "commercial setting," *id.* 31, 36 n.30, and suggest that rather than directly challenging the conduct of the government of Saudi Arabia, they are merely pursuing employment-related claims against the Hospital and Saudi Arabia as its "Owner."

These recharacterizations of the case are untenable. More important, Respondents' new legal theory fails for precisely the same reasons as their earlier arguments. Respondents seek a ruling that the FSIA's "commercial activity" exception confers jurisdiction whenever a suit challenges a foreign state act that has *some relationship* to commercial activities of that foreign state; specifically, they contend that "every relevant 'transaction or act' " in this case had a commercial character because it related to Respondent's employment by the Hospital. *Id.* 26, 32. Under this theory, there is no type of foreign sovereign conduct that is immune from suit in United States courts. Such a limitless construction of the FSIA's "commercial activity" exception is impermissible under both the statutory language and this Court's decision in *Republic of Argentina v. Weltover, Inc.*, 112 S. Ct. 2160 (1992), which make crystal clear that jurisdiction hinges not on the *purpose* for a foreign sovereign's actions, but on the intrinsic *nature* of those actions. Arrest and imprisonment of Respondent by Saudi government officials acting in their official capacity are manifestly *not* actions of a commercial nature, and therefore cannot support jurisdiction under the "commercial activity" exception, regardless of whether they occurred in a supposed "commercial setting," Resp. Br. 36 n.30, or were carried out for a commercial purpose. Such inherently governmental acts —*actiones jure imperii*—are immune from suit under the FSIA.

In the alternative, even if this action could somehow be said to be based upon commercial activity, Respondents have failed to show that such activity had the requisite "substantial contact with the United States." 28 U.S.C. § 1603(e) (1988). Every act of arguable significance to Respondents' claims—*e.g.*, the performance of the employment contract, the alleged reporting of safety violations at the Hospital, the arrest and imprisonment, and the alleged injuries from mistreatment in prison—occurred solely in Saudi Arabia. Pet. Br. 42-43. Respondents' effort to sidestep these undisputed facts, by focusing instead on Petitioners' alleged overall level of "recruitment" activity in the United States, is unavailing. Section 1605(a)(2) does not authorize jurisdiction merely because a foreign state does business in the United States. Jurisdiction cannot exist here because the *particular* commercial activity on which Respondents argue the claims are based did not have substantial contact with the United States.

ARGUMENT

I. THE COMPLAINT IS NOT "BASED UPON COMMERCIAL ACTIVITY" WITHIN THE MEANING OF CLAUSE ONE OF SECTION 1605(A)(2)

A. Respondents' Interpretation Contravenes The Language, History And Purpose Of The FSIA

The court of appeals held that an action is "based upon" commercial activity under Clause One of Section 1605(a)(2) "when there is a 'jurisdictional nexus' between the acts for which damages are sought, and the foreign sovereign's commercial activity." J.A. 109. This "jurisdictional nexus" test was expressly advocated by Respondents in the courts below. *See, e.g.*, Appellants' Brief, filed January 4, 1992 at 27-28 (advocating the "nexus" approach and arguing that jurisdiction exists because of "the relation or connection of the acts complained of (arbitrary detention and torture) and the defendants' commercial activity in the United States (recruitment and other acts)"). As demonstrated at Pet. Br. 18-20, this "nexus" test contravenes the plain meaning of "based

upon" in Section 1605(a)(2), which is that the very *basis* or *foundation* of a civil action—*i.e.*, the "acts for which damages are sought" (to use the Eleventh Circuit's words) or "the acts complained of" (to use Respondents' words)—must be commercial in nature. It is not sufficient that the acts complained of merely have a "nexus" or "connection" or "relationship" with other commercial conduct of the foreign state. To hold otherwise would contravene the FSIA's mandate that the distinction between commercial and governmental acts must turn on the *nature* of the foreign state's conduct rather than its *purpose*, *see* Pet. Br. 20-21 (discussing 28 U.S.C. § 1603(d) as construed in *Weltover*), as well as defeat Congress's purpose in enacting the restrictive principle of sovereign immunity under which acts of an inherently governmental nature (*actiones jure imperii*) are immune from suit in United States courts. *See* Pet. Br. 25-31.

Respondents' brief abandons their former "jurisdictional nexus" theory and acknowledges that, just as Petitioners have argued, "[i]n its ordinary sense, the word 'based' would refer to the 'foundation' of the action, or that upon which it rests or stands," Resp. Br. 24, and that "the basis of an action may properly be determined with reference to 'the elements of the cause of action or the gravamen of the complaint.'" *Id.* (citation omitted). But having abandoned the "nexus" construction of "based upon," Respondents then go on to construct a new argument that leads to the same impermissible end. Citing Section 1603(d)'s definition of "commercial activity" as either "a regular course of commercial conduct or a particular commercial transaction or act," Respondents argue that whenever a foreign state engages in any "regular course of commercial conduct," *all* actions of that state that allegedly "aris[e] from" or are "part and parcel of" or are "rooted in" or "relate" to or are "bound up with" that course of conduct are necessarily commercial. *Id.* 22, 24, 25, 31 n.24. Asserting that their case "is squarely based upon the Hospital's regular course of conduct in staffing, maintaining and operating a health [care] enterprise," *id.* at 25, and that the Hospital is "an inherently commercial enterprise," *id.* at 27, 32, Respondents conclude that *every* act taken in that supposed "commercial setting" is by definition a commercial act. *Id.* 24-25. This novel and limitless theory must be rejected for numerous reasons.

First, Respondents' new argument essentially reintroduces the "nexus" concept in another guise. By their various formulations—*e.g.*, that Respondent's arrest and imprisonment were "part and parcel of" or "arose from" or were "rooted in" the Hospital's ordinary commercial activities[2]—Respondents again are contending that jurisdiction may exist whenever the acts complained of (here, arrest and imprisonment) are *related to* commercial activities. Just as such a "relationship" or "nexus" test cannot be found in the "based upon" language, it also cannot be read into Section 1603(d)'s definition of "commercial activity."[3] By defining "commercial activity" to

[2] In pulling these various phrases from lower court opinions, Respondents confuse authority discussing whether *indisputedly commercial activity* has "substantial contact" with the United States with authority concerning whether an action is based upon commercial activity at all. *See* Pet. Br. 21-22. For example, *Gemini Shipping, Inc. v. Foreign Trade Org. for Chemicals and Foodstuffs*, 647 F.2d 317 (2d Cir. 1981), does not support Respondents' contention that Clause One extends jurisdiction to any conduct, even if sovereign in nature, which is "part and parcel of" a regular course of commercial conduct. In that case, it was "clear beyond doubt" that the specific conduct complained of—the breach of a contractual guarantee—was commercial, and the court used the "part and parcel of" language solely in addressing the separate issue of whether the breach had "substantial contact with the United States." *Id.* at 319. The same is true with respect to the use of the phrase "arises from" in *Gould, Inc. v. Mitsui Mining & Smelting Co.*, 947 F.2d 218, 221 (6th Cir. 1991), *cert. dismissed*, 112 S. Ct. 1657 (1992).

[3] Respondents' argument that "based upon" as used in Clause One of Section 1605(a)(2) has a different and broader meaning than in Clause Two, Resp. Br. 23, is contradicted by the legislative history explaining the reason for adopting Clause Two:

> Although some or all of these acts might be considered to be a "commercial activity carried on in the United States" as broadly

encompass either "a regular course of commercial conduct or a particular commercial transaction or act," Section 1603(d) simply ensures that a foreign state cannot avoid suit on a theory that the commercial act on which a claim is based was merely a one-time or limited act rather than part of a larger or regular course of conduct. *See* House Report at 17.

Contrary to Respondents' argument, however, this definition of "commercial activity" does *not* establish that if a foreign state creates an agency or instrumentality to engage in a regular course of commercial conduct, *all* acts taken by or in connection with that "enterprise" are *ipso facto* commercial and sovereign immunity is unavailable.[4] The nature of the particular acts complained of, not the general purposes of the foreign state "enterprise," is controlling under the "commercial activity" exception. *See* 28 U.S.C. § 1603(d) ("The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act,

---

> defined in § 1603(e), it has seemed advisable to provide expressly for the case where a claim arises out of a specific act in the United States which is commercial or private in nature and which relates to a commercial activity abroad. It should be noted that the acts (or omissions) encompassed in this category are limited to those which in and of themselves are sufficient to form the basis of a cause of action.

H.R. Rep. No. 1487, 94th Cong., 2d Sess. 19 (1976) [hereinafter House Report]. Thus, the difference is simply that in Clause Two, the act forming the basis of the cause of action must have occurred in the United States, whereas in Clause One, the act forming the basis of the cause of action may have occurred elsewhere so long as it had "substantial contact" with the United States. But in either case, "based upon" means the same thing: jurisdiction exists only if the particular conduct complained of (the basis of the action) is commercial. *See* Pet. Br. 19 n.14.

[4] The FSIA "starts from a premise of immunity and then creates exceptions to the general principle." House Report at 17; *accord* 28 U.S.C. § 1604. This presumption of immunity applies fully to "a political subdivision of a foreign state or an agency or instrumentality of a foreign state," 28 U.S.C. § 1603(a), a category which Respondents concede encompasses the Hospital. Resp. Br. 3.

rather than by reference to its purpose."). For example, a foreign government may be sued under the "commercial activity" exception for breaching a contract to purchase provisions for its armed forces, notwithstanding that maintaining an army is a uniquely non-commercial "enterprise," because the particular conduct on which the claim is based (breach of contract) is commercial in nature. *See* House Report at 15-16. Conversely, even if a foreign state engages in a regular course of commercial conduct, it will be immune from suit where the particular acts complained of are public in nature.

In sum, Respondents' new theory of the statute fails because "based upon commercial activity" does not encompass any commercial conduct connected with or relating to a claim, but only the particular conduct alleged to have injured the claimant. *See Weltover*, 112 S. Ct. at 2166 ("[T]he issue is whether the *particular actions* that the foreign sovereign performs (whatever the motivation behind them) are the type of actions by which a private party engages in 'trade and traffic or commerce.'") (emphasis added)). No court has adopted Respondents' theory that "inherently commercial enterprises" are deprived of immunity for even noncommercial, sovereign conduct,[5] and such a theory is incompatible with the stat-

---

[5] Even where a foreign state generally engages in a commercial venture, the lower courts have uniformly refused to exercise jurisdiction unless the *particular* acts complained of were themselves commercial. *See, e.g., Millen Indus. Inc. v. Coordination Council for N. Am. Affairs*, 855 F.2d 879 (D.C. Cir. 1988) (Clause One may provide jurisdiction over foreign state defendant acting as "public relations agent and broker" only for claims based upon promise to help expedite customs but not for claims based upon promises that plaintiffs would receive duty-free treatment); *cf. Letelier v. Republic of Chile*, 748 F.2d 790 (2d Cir. 1984) (FSIA does not permit execution of judgment against state-owned airline where the act in question, state-sponsored terrorism, was not commercial), *cert. denied*, 471 U.S. 1125 (1985). Similarly, the authority cited by Respondents themselves, *see* Resp. Br. 29 n.22, permitted jurisdiction under Clause One *only* where the specific conduct complained of was commercial. *Compare Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1378-80 (5th Cir. 1980) (state-owned airline

ute and this Court's decision in *Weltover*. Petitioners are immune from suit in this case because the conduct at issue, irrespective of its connection to the supposed "inherently commercial" purposes of the Hospital,[6] is sovereign in nature.

B. Respondents' Intentional Tort Claims Are Based Upon Governmental Rather Than Commercial Conduct, And Therefore Cannot Be Adjudicated Under The "Commercial Activity" Exception

Necessarily acknowledging that governmental law enforcement conduct is sovereign in nature, Resp. Br. 30 n.23, 33 n.27, 36 n.30, Respondents try to rewrite their complaint and revise their allegations so as to appear to challenge only employment-related commercial acts. They complain that "[i]nstead of a case brought against a hospital and its owner, Petitioners would characterize the case as one brought against a police department," and they profess puzzlement that anyone would think the case challenged "Saudi law enforcement activity." *Id.* 22. Respondents portray their claims as merely implicating "employment practices" and "disciplinary measures" of the Hospital, *id.* 26-28, 32 n.25; urge that *any* Hospital action whatever is "inherently commercial" in nature, *id.* 14, 22, 32; argue that Saudi Arabia as "Owner" is the "alter ego" of the Hospital and therefore is vicariously liable for the Hospital's supposed commercial acts, *id.* 31-36; and

---

immune from suit for false imprisonment and battery where acts of "involuntary re-routing" complained of were acts of immigration control) *with Ohntrup v. Firearms Ctr., Inc.*, 516 F. Supp. 1281 (E.D. Pa. 1981), *aff'd mem.*, 760 F.2d 259 & 263 (3d Cir. 1985) (Clause One provided jurisdiction over product liability action against state-owned manufacturer of firearms where gravamen of complaint was malfunctioning of firearm).

[6] In addition to being irrelevant, Respondents' repeated assertion that the Hospital is an "inherently commercial" enterprise, Resp. Br. 14, 22, 32, is unsupported by the record. The fact that the Hospital has purchased materials and hired employees does not mean that *all* activities of the Hospital are "the type of actions by which a private party engages in 'trade and traffic or commerce.'" *Weltover*, 112 S. Ct. at 2166.

conclude that to the extent Saudi law enforcement personnel became involved in the so-called employee disciplinary measures, "those law enforcement personnel . . . could only be thought to have taken on the commercial character of the Hospital enterprise that enlisted them." *Id.* 34 n.28. This reconstructed theory of the case is meritless on both the facts and the law.

First, Respondents' effort to recast this as an "employment practices" case, rather than one alleging injury from improper exercise of governmental police powers, is incredible. The suggestion that the "core of the complaint" is not the first eight counts against Saudi Arabia but rather Counts IX to XII against KFSH, *see id.* 10, is self-evidently implausible. More important, Respondents' own words, in the complaint and elsewhere, reveal that they challenge a foreign government's alleged improper exercise of sovereign power, not the commercial acts of a "hospital enterprise." For example, Respondents have alleged that Respondent was "arrested," J.A. 56, 59, 60; that he was "taken to the Criminal Investigation Division," J.A. 58; that agents or employees of Saudi Arabia "acting in their official capacity" mistreated and injured him in "a jail cell," J.A. 5; that "police investigators" "repeatedly interrogated" him, J.A. 5; and that he was held in custody at Al Sijan Prison "to await trial." J.A. 59. Respondents have emphatically contended at every stage of this case that *all* of the alleged actions of *all* of the Petitioners were taken "under color of law." *See* Respondents' Brief in Opposition to Petition for Certiorari at 7; Appellants' Brief at 6; R. 83, 12-27. Respondents simply cannot be heard to say that their complaint does not allege that their injuries resulted from the wrongful exercise of the uniquely *governmental* power to arrest, interrogate, and imprison individuals.[7]

---

[7] Having filled the complaint with terms such as "arrest," "prison," and "police," Respondents now contend that "[t]he significance of these terms must be weighed in accordance with the accustomed rule that the facts alleged are to be generously construed." Resp. Br. 30 n.23. Respondents thus seek to hold out the possibility

Respondents try to avoid this fact by emphasizing the alleged retaliatory motive for the arrest and imprisonment. Asserting that wrongful discharge by the Hospital would have been a commercial act, Respondents reason that "[t]he fact that in [Respondent's] case the particular act of retaliation was not limited to discharge does not make it any less private or commercial in nature; that it involved detention and torture rather than routine acts and a letter of dismissal is hardly dispositive." Resp. Br. 28. But this difference in the nature of the conduct at issue *is* dispositive, because the FSIA makes it so. This case is not about wrongful termination or other breach of contract, as Respondents have taken pains to make clear,[8] but rather is about alleged wrongful arrest and imprisonment by Saudi officials acting under color of law. Even if the latter conduct had a retaliatory *purpose*, the FSIA jurisdictional inquiry depends solely on the *nature* of the conduct.

Thus, Respondents' diversionary effort to create a supposed issue of fact by denying that Respondent was arrested and imprisoned for falsifying his academic credentials, *id.* 9 nn. 8-9, is beside the point. In fact, Respondent admits that he lied about his academic credentials, *id.* 9;[9] there is indisputable documentary evidence

htat their complaint really means "not the police" or "not a Saudi prison" or "not an arrest"—a reading that no amount of generosity can permit. Moreover, Respondents' claim of uncertainty as to whether Saudi government personnel were involved in the alleged wrongful acts, *see, e.g., id.* 30 n.23, 34 n.28, is belied by all of Respondent's many prior allegations, which allege the involvement of particular law enforcement agencies (such as the "Criminal Investigative Division" and the "Head of the Prison"), J.A. 53, and even particular individuals (such as "Lt. Addullah Aziz" and "Captain Mohammed of the prison"), J.A. 59, 60.

[8] *See* R. 29, 7 (Respondents conceded that their claims are not "disputes relating to the contract"). An apparent reason for this position is that Respondent's contract provides that "[i]n the case of any dispute arising from this contract, the Saudi courts, authorities or commissions only will have jurisdiction." J.A. 47.

[9] Respondent claims that he has acknowledged his misrepresentations ever "since 1984," Resp. Br. 9, but at the 1987 congressional

that, *before* his arrest, Respondent was aware that his submission of a forged diploma had come to light and was under investigation, R. 29, Pl.'s Ex. 4; and a State Department report submitted to Congress demonstrates that a U.S. consular officer who visited Respondent in prison was told that Respondent "was arrested for having presented Saudi officials a fraudulent college degree from MIT as proof of job qualifications." J.A. 64.[10]

More important, the resolution of this dispute as to *why* Respondent was arrested and imprisoned is irrelevant to the jurisdictional issue and, indeed, is exactly the inquiry as to which Petitioners are immune under the FSIA.[11] By continuously characterizing the arrest and

hearing he made no mention of them and insisted repeatedly that there was no possible explanation for his arrest other than his reporting of alleged safety violations. Respondent's effort to parse his exchange with Congressman Lantos so as to avoid acknowledging that he misled Congress, *see id.* 9 n.9, is unavailing. Respondent was not asked only if he had been charged with a crime, as Respondents suggest, but also whether "[t]he only thing [he] did [to prompt the arrest] was call attention to unsafe conditions at the hospital where [he] worked." J.A. 62. Respondent answered, "Yes," despite knowing full well that his own deceitful conduct had been uncovered and was under scrutiny before his arrest.

[10] Respondents' contention that this State Department report, which reflects a consular officer's contemporaneous first-hand knowledge, "has no evidentiary value," Resp. Br. 9 n.9, is baseless. Equally meritless is their suggestion, *see id.*, that this report was disavowed by two other State Department officials who, lacking any first-hand knowledge concerning Respondent's case, merely stated generally that they had no basis to dispute the allegations of the various witnesses who testified at the 1987 congressional hearing. *See, e.g.*, J.A. 65-66 (testimony of Marion D. Creekmore, Deputy Assistant Secretary of State) (asked about the "veracity of the witnesses," he responded, "I was not here for all of it . . . . I will simply, without being able to be absolutely certain about it, take what they say.").

[11] Respondents' suggestion that the district court should have conducted an evidentiary hearing on this factual dispute, Resp. Br. 21 n.15, ignores the fact that immunity involves protection from suit, "not a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526-27 (1985). An evidentiary hearing on why Respond-

imprisonment as "retaliatory" or "disciplinary," *see* Resp. Br. 2, 27, 31, 32 n.25, Respondents seek to ground jurisdiction on the *reasons* for the acts. This Court in *Weltover* rejected such a theory in unequivocal terms: "However difficult it may be in some cases to separate 'purpose' (*i.e.*, the *reason* why the foreign state engages in the activity) from 'nature' (*i.e.*, the outward form of the conduct that the sovereign state performs or agrees to perform), the statute unmistakably commands that to be done." 112 S. Ct. at 2167 (emphasis in original) (citation omitted); *see id.* ("[I]t is irrelevant *why* Argentina participated in the bond market . . . .") (emphasis in original). Even if the "reason why" Respondent was arrested and imprisoned was to discipline him or retaliate against him, the "outward form of the conduct"—arrest and imprisonment by government officials acting under color of law—was sovereign, and therefore is immune from suit.[12] Not surprisingly, Respondents have not identified a single case in which any U.S. court has found jurisdiction under the "commercial activity" exception to decide claims based upon a foreign sovereign's exercise of police powers within its own borders.

Finally, Respondents' effort to distinguish between "the Hospital and Saudi Arabia as Owner" on the one hand and Saudi Arabia as "police department" and sovereign on the other hand, with the result that "the Hospital and its Owner" by definition can only engage in commercial acts and therefore cannot invoke sovereign immunity, is wholly unfounded. A plaintiff may not circumvent the FSIA's grant of immunity for sovereign

---

ent was arrested would be tantamount to a trial on the merits and would "frustrate the significance and benefit of entitlement to immunity from suit." *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 449 (D.C. Cir. 1990) (citation omitted).

[12] The unlimited breadth of Respondents' proposed theory of the "commercial activity" exception is further illustrated by their assertion that even if Respondent was arrested and imprisoned for committing forgery, jurisdiction would nonetheless exist because such forgery was "bound up with" the Hospital's employment practices. Resp. Br. 31 n.24.

law enforcement conduct merely by alleging the involvement of some governmental employees or entities in addition to the "police department" or other government ministry that most directly exercises the powers in question. Respondents completely miss the point in suggesting that "there is no basis for concluding that the Saudi Government divested the Hospital, itself an inherently commercial enterprise, of its normal character and thereby cloaked it with the immunity of a police department." Resp. Br. 32. The Hospital does not need to "derive" or be "cloaked with" immunity from elsewhere. It is a "foreign sovereign" in its own right under the FSIA and is immune from any suit challenging its conduct of a governmental nature.[13] The claims against the Hospital are based on its alleged participation in the arrest and imprisonment of Respondent under color of Saudi law. Whether Hospital officials acted lawfully in exercising such powers is the *merits* issue; the dispositive *jurisdictional* issue turns on the fact that the Hospital's conduct at issue was of a uniquely governmental nature rather than conduct "but which [a] private party engages in "trade and traffic or commerce.'" *Weltover*, 112 S. Ct. at 2160.

Indeed, Respondents themselves contend that Saudi Arabia is the Hospital's "alter ego" and that "for all purposes relevant to the . . . disposition of Petitioners' motion to dismiss, the Hospital and its Owner [Saudi Arabia] are one and the same." Resp. Br. 17. Thus, under Respondents' own theory of the case, every partici-

---

[13] Respondents' reliance on *Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985), *see* Resp. Br. 31, is misplaced. The *Callejo* court, explaining the earlier decision in *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371 (5th Cir. 1980), stated that the state-owned airline in *Arango*, which was charged with battery and false imprisonment, "acquired immunity not derivatively from the government's sovereign acts, but only by participating directly in those acts—that is, by acting as a sovereign itself." 764 F.2d at 1109-10. Similarly, if the Hospital participated in Respondent's arrest and imprisonment under color of law, such conduct would not require "derivative immunity," but would be immune in its own right because the Hospital was "acting as a sovereign itself."

pant allegedly responsible for Respondents' injuries, whether associated with the Hospital or another entity, was under the direction and control of Saudi Arabia. It therefore is especially untenable for Respondents to purport to distinguish "the Hospital and Saudi Arabia as Owner" from Saudi Arabia as sovereign.[14] Respondents allege that the government of Saudi Arabia, acting through various employees, agents and entities, injured Respondent through wrongful arrest, imprisonment, and mistreatment in prison. All of Petitioners are entitled to immunity because their alleged conduct was plainly not commercial in nature.

C. Respondents' Negligence Claims Are Not "Based Upon Commercial Activity"

Respondents concede that their "duty to warn" negligence claims turn on the propriety of Saudi law enforcement conduct which is "sovereign in nature." *See* Resp. Br. 33 n.27, 40 (noting "Petitioners' understandable concern" that the "duty to warn" claims would require "'an expansive inquiry into police practices of Saudi Arabia'"). For this very reason, Respondents' attempt to plead around Petitioners' immunity, by alleging that

[14] In an ironic twist on their former "nexus" theory, Respondents now contend that "[t]he alleged law enforcement 'nexus' does not divest the Hospital's activities of their commercial nature," Resp. Br. 30, and indeed that the Saudi law enforcement officials involved must have "taken on the commercial character" of the Hospital, *id.* 34 n.28. Neither of the cases Respondents principally rely on, *id.* 31-32, supports such an extraordinary proposition. In *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438 (D.C. Cir. 1990), the court noted "that Foremost's complaint alleges actions that are both commercial and governmental in nature," and reiterated that "when a 'transaction partakes of both commercial and sovereign elements,' 'jurisdiction will not obtain if the cause of action is based on a sovereign activity.'" *Id.* at 450 (citing *Millen*, 855 F.2d at 885). Similarly, in *Walter Fuller Aircraft Sales, Inc. v. Republic of the Philippines*, 965 F.2d 1375 (5th Cir. 1992), the court held only that where the specific act complained of (breach of contract) was commercial, the foreign state's alleged sovereign motivation for that act was irrelevant—precisely the analysis advocated by Petitioners. Pet. Br. 22-23.

Petitioners should have warned Respondents of the alleged abuse of the police power in Saudi Arabia, cannot be permitted because it would eviscerate the FSIA's intended immunity for a foreign sovereign's public acts within its own borders. *See* Pet. Br. 36-38.

In *United States v. Shearer*, 473 U.S. 52 (1985), this Court rejected a similar attempt by a plaintiff to circumvent the United States' immunity under the Federal Tort Claims Act (FTCA) by pleading a breach of a duty to warn. Pet. Br. 37-38. Respondents' effort to distinguish *Shearer* because it "did not involve an independent duty as exists here," Resp. Br. 39 n.34, is misplaced. *Shearer* did not turn on the existence of an independent duty to warn,[15] but on the fact that the plaintiff's claims necessarily challenged conduct—"deliberate attacks by Government employees"—for which the government was immune under the FTCA. 473 U.S. at 55.[16] As in *Shearer*, Respondents' factual allegations would require U.S. courts to enter into a line of inquiry that is impermissible under

[15] Respondents' reliance on *Doe v. United States*, 838 F.2d 220, 222 (7th Cir. 1988), and *Kearney v. United States*, 815 F.2d 535, 537 (9th Cir. 1987), as standing for the proposition that Petitioners owed an independent duty to Respondent, is misplaced. Neither case involved a duty to warn. Rather, both cases involved entirely different situations where the government assumed an affirmative duty to protect the plaintiff (child care and prison, respectively) which had been breached by negligent supervision of the children and prisoners. *See also* Pet. Br. 38 n.22.

[16] Respondents' effort to distinguish *Shearer* because Section 2680(h) of the FTCA is broader than Section 1605(a)(2) of the FSIA, *see* Resp. Br. 39 n.34, ignores the different context of these provisions. Because Section 2680(h) is an exception to the FTCA's general waiver of immunity, it sets out specific circumstances, claims of assault and battery, to which the waiver does not extend. Section 1605(a)(2), on the other hand, performs the opposite function by specifying those instances in which a plaintiff may bring suit, regardless of the FSIA's grant of immunity to foreign states. Thus, because the purposes of these two sections are diametrically opposed, Respondents' argument that Section 2680(h) is more sweeping than Section 1605(a)(2) is simply wrong.

the FSIA.[17] Because Respondents' "duty to warn" claims require proof of the alleged unlawful governmental acts of Saudi officials within Saudi borders, and further would entail an even broader inquiry into the propriety of the Saudi law enforcement system in general, *see* Pet. Br. 38, these claims are clearly based upon sovereign activity and therefore are immune from suit under Section 1605(a)(2).

D. Respondents' "Public Policy" Arguments Are Properly Addressed To Congress, Not To This Court

Respondents request this Court to find jurisdiction on "public policy" grounds, on a theory that an exception to sovereign immunity under the FSIA should be recognized for foreign state conduct which is "plainly unlawful and especially repugnant" or, alternatively, where alleged "human rights abuses [are] carried out by governments in a business context." Resp. Br. 35; *see also* Brief of International Human Rights Law Group, *et al.* 48. Such a theory has no basis in the statutory language or purposes,[18] and would make sovereign immunity a mirage by allowing the plaintiff's mere allegations of unlawful conduct to serve as the very basis for jurisdiction. Moreover, as Respondents concede, Resp. Br. 36 n.30, their "public policy" exception to immunity would contravene *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), which held that sovereign immunity "is granted in those cases involving alleged violations of international law that do not come within one of the FSIA's exceptions." *Id.* at 436. Respondents' public policy arguments have no place in the interpretation of the FSIA, but should be directed to Congress.

[17] Plaintiff's suit was also barred by *Feres v. United States*, 340 U.S. 135 (1950), because it would require an impermissible inquiry into military affairs. *Shearer*, 473 U.S. at 59.

[18] Indeed, such an "exception" would undermine Congress's key objective of avoiding the adverse consequences to U.S. foreign relations that could result from U.S. court adjudication of a foreign state's public acts. *See* Pet. Br. 31-34. The United States has expressed its serious concern that Respondents' proposed expansive interpretation of the FSIA would make it "difficult or impossible for the United States successfully to claim immunity elsewhere for its own such sovereign activities." J.A. 121-22; *accord* Pet. Br. 34-35. Contrary to Respondents' assertion that "the U.S. Government asserts no such [foreign policy] interest in its submission to this Court," Resp. Br. 36 n.32, the United States explained in supporting the petition for writ of certiorari that the importance of properly applying the FSIA "is heightened in cases, as here, where the lawsuit implicates the foreign state's exercise of law enforcement activity within its own borders." Brief for the United States as *Amicus Curiae* 8.

II. RESPONDENTS' CLAIMS HAVE INSUFFICIENT CONTACT WITH THE UNITED STATES TO SUPPORT JURISDICTION UNDER SECTION 1605(A)(2)

Even if Respondents could establish that their suit is based upon commercial activity to the extent it relates to Respondent's employment in Saudi Arabia, they have failed to show that such activity was "carried on in the United States," 28 U.S.C. § 1605(a)(2), *i.e.*, had "substantial contact with the United States." *Id.* § 1603(e). Respondents do not dispute that "the commercial activity that provides the jurisdictional nexus with the United States must also be the activity on which the lawsuit is based," *Stena Rederi AB v. Comision de Contratos*, 923 F.2d 380, 387 (5th Cir. 1991), or that the connection with the United States must be "material." Resp. Br. 43. This "substantial contact" requirement is not satisfied here because all pertinent activities took place in Saudi Arabia.[19]

Respondents themselves state that "[t]he gravamen or theory of the complaint relates [Respondent's] injuries to wrongful retaliation taken against [Respondent] for his *job performance*." *Id.* (emphasis added). Respondents contend that they were injured *wholly* in Saudi

[19] Respondents contend that "the United States suggests that clause 1 restricts jurisdiction to cases in which the commercial activities providing the basis for the claim, occur in this country," Resp. Br. 41, but the United States has taken the contrary position. *See* Brief for the United States as *Amicus Curiae* Supporting Petitioners at 18 n.13.

Arabia, as a result of arrest, imprisonment, and torture of Respondent *wholly* in Saudi Arabia, for reporting an unsafe condition at a hospital that employed him *wholly* in Saudi Arabia. Thus, even accepting Respondents' notion that these are "commercial" activities upon which this lawsuit is based, Respondents' tort claims do not require proof of any act that occurred in the United States. The incidental contacts with the United States involving the recruitment and hiring of Respondent have no legal or factual relevance to these claims.[20]

Rather than emphasize the specific facts relating to Respondent's employment and alleged injuries in Saudi Arabia, Respondents focus instead on the overall "recruiting activities" of Hospital Corporation of America (HCA) in the United States. Respondents try to depict the Hospital as "critically dependent upon" and indeed "ow[ing] its very existence to," the "ongoing [recruitment] program" in the United States allegedly "sustained for more than a decade" by HCA. Resp. Br. 4, 43-44. Such assertions not only are unsupported,[21] but also are irrelevant to the jurisdictional inquiry. By focusing on alleged generalized recruiting activity in the

[20] Even if Respondents' claims were somehow deemed to be based upon his recruitment and hiring, such activities were not "carried on in the United States." Respondents dwell on the allegation that Respondent saw a KFSH job advertisement while in the United States, without acknowledging that he initially traveled to Saudi Arabia not because of any such "recruitment" by Petitioners, but because he was hired by another United States company to work in Saudi Arabia. Pet. Br. 3. Although conceding that Respondent "interviewed for the job in Saudi Arabia," Resp. Br. 5, Respondents omit to add that he both was offered the position and decided to take it *while still in Saudi Arabia*, before he "returned to the United States to complete the processing requirements (visas, medical exam, etc.)" for the job. J.A. 57. They also avoid mentioning that the employment contract did not become effective until Respondent commenced his employment in Saudi Arabia in December 1983. J.A. 40.

[21] Respondents merely cite to the existence of a contract between HCA and Saudi Arabia and to the acts in 1983 that allegedly relate to the recruitment of Respondent. Resp. Br. 43-44.

United States, and not upon the specific activities on which *this case* is allegedly based, Respondents essentially ask this Court to adopt a "doing business" test to satisfy the "substantial contact" requirement. The statute, legislative history, and case law all make clear, however, that the "substantial contact" standard requires more than the due process requirement of minimum contacts. Pet. Br. 40-41.

Finally, Respondents argue that their "duty to warn" claims have a substantial connection to the United States because the Hospital's alleged duty to warn arose "before [Respondent] signed his contract" or, alternatively, when Respondent became "obligated under that agreement." Resp. Br. 47. This contention ignores the fact that Respondent interviewed for and decided to take the job in Saudi Arabia, and that his employment obligations did not commence until he began working for the Hospital in Saudi Arabia.[22] As with the other potentially relevant activity, Saudi Arabia is the locus of any alleged omission.[23] Pet. Br. 44-45. Accordingly, the negligence claims also lack "substantial contact" with the United States.

[22] Respondents rely upon a hornbook citation for the proposition that "common law duties arise at [the] creation of [a] master/servant relationship." Resp. Br. 47 n.46. Despite the fact that this citation refers to when—not where—a duty may have arisen, by Respondents' own theory that duty could have arisen only after Respondent commenced his employment in Saudi Arabia in December 1983. J.A. 4, 40.

[23] Saudi Arabia has repeatedly made clear to Respondents that it is prepared to assist them and their counsel to invoke its administrative and/or legal processes as well as its laws and directives against any mistreatment while in police custody. Pet. Br. 7.

CONCLUSION

For the reasons set forth above and in Petitioners' opening brief, the judgment of the court of appeals should be reversed and Respondents' actions should be dismissed.

Respectfully submitted,

EVERETT C. JOHNSON, JR.
(Counsel of Record)
MARK E. NEWELL
PHILIP L. GORDON
CURTIS P. LU
LATHAM & WATKINS
1001 Pennsylvania Avenue, N.W.
Suite 1300
Washington, D.C. 20004
(202) 637-2200

MARC COOPER
COOPER & WOLFE, P.A.
Suite 700 Courthouse Tower
44 West Flagler Street
Miami, FL 33130
(305) 371-1597

Counsel for Petitioners
Kingdom of Saudi Arabia,
King Faisal Specialist
Hospital and Royspec